

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

FRANCISCAN ALLIANCE, INC.;
SPECIALTY PHYSICIANS OF
ILLINOIS, LLC;,
CHRISTIAN MEDICAL &
DENTAL ASSOCIATIONS;

- and -

STATE OF TEXAS;
STATE OF WISCONSIN;
STATE OF NEBRASKA;
COMMONWEALTH OF
KENTUCKY, by and through
Governor Matthew G. Bevin;
STATE OF KANSAS; STATE OF
LOUISIANA; STATE OF
ARIZONA; and STATE OF
MISSISSIPPI, by and through
Governor Phil Bryant,

Plaintiffs,

v.

SYLVIA BURWELL, Secretary
of the United States Department of
Health and Human Services; and
UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

**STATE PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT
OR, IN THE ALTERNATIVE,
PRELIMINARY INJUNCTION**

Civ. Action No. 7:16-cv-00108-O

Plaintiffs State of Texas, State of Wisconsin, State of Nebraska, Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, State of Kansas, State of Louisiana, State of Arizona, and State of Mississippi, by and through Governor Phil Bryant (collectively, “State Plaintiffs”), by and through counsel, and pursuant to Federal Rules of Civil Procedure 56(a) and 65, and LR 56, respectfully move this Court for partial summary judgment, or in the alternative a preliminary injunction, on Counts I, II, III, and XVI in their First Amended Complaint. There are no genuine issues of material fact and the State Plaintiffs are entitled to judgment as a matter of law. The State Plaintiffs are not pursuing summary judgment on their other claims at this time, but reserve the right to do so.

SUMMARY

The State Plaintiffs move for partial summary judgment on grounds that 45 C.F.R. § 92 (the “Rule”), which redefines “sex” to include “gender identity,” “sex stereotypes,” and “termination of pregnancy,” in Section 1557 of the Affordable Care Act and in Title IX, violates the Spending Clause of Article I, Section 8 of the United States Constitution (Count XVI) and the Administrative Procedure Act (“APA”) (Counts I, II, & III). The Rule violates the Spending Clause’s clear-statement doctrine by imposing ambiguous conditions on the State Plaintiffs’ acceptance of Medicaid and Medicare funding. *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (“The spending power is of course not unlimited [W]e have required that if Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’”). The Rule violates the APA because it is “not in accordance with law” and is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5. U.S.C. § 706(1)(A) & (C).

The State Plaintiffs specifically request the following relief against the Defendants, their agents, servants, employees, attorneys, and all persons and entities in active concert or participation with them, directly or indirectly:

1. A declaratory judgment that the Rule violates the Spending Clause of Article I, Section 8 of the United States Constitution;
2. A declaratory judgment that the Rule is invalid under the APA; and
3. A permanent injunction prohibiting Defendants from enforcing the Rule.

In the alternative, if the Court does not have time to rule on the motion for partial summary judgment by January 1, 2017—when the State Plaintiffs will be obligated to make significant and expensive changes to their medical facilities, professional regulations, and insurance plans—the Plaintiffs are entitled to a preliminary injunction against the Rule for the same reasons. Plaintiffs also request that the Court waive the bond requirement in Rule 65(c) because Defendants will not incur costs or damages during the pendency of the injunction, but the State Plaintiffs will if an injunction does not issue.

In support of this Motion, the State Plaintiffs rely on the following:

- A. Brief in Support of State Plaintiffs' Motion for Partial Summary Judgment, filed Oct. 21, 2016;
- B. Brief in Support of Plaintiffs Franciscan Alliance, et al. Motion for Partial Summary Judgment, filed Oct. 21, 2016;
- C. Plaintiffs' First Amended Complaint, ECF No. 21; and
- D. All further evidence necessary to support this Motion.

Wherefore, the State Plaintiffs respectfully request that judgment be entered in their favor and against Defendants.

Respectfully submitted this the 21st day of October, 2016.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY D. STARR
Deputy First Assistant Attorney General

PRERAK SHAH
Senior Counsel to the Attorney General

ANDREW D. LEONIE
Associate Deputy Attorney General

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS
Associate Deputy Attorney General
Texas Bar No. 24002695
austin.nimocks@oag.texas.gov

MICHAEL C. TOTH
Senior Counsel

JOEL STONEDALE
Counsel

Office of Special Litigation
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Mail Code 009
Austin, Texas 78711-2548
(512) 936-1414

*ATTORNEYS FOR PLAINTIFFS
STATE OF TEXAS; STATE OF
WISCONSIN; STATE OF
NEBRASKA; COMMONWEALTH
OF KENTUCKY, by and through
Governor Matthew G. Bevin;
STATE OF KANSAS; STATE OF
LOUISIANA; STATE OF ARIZONA; and
STATE OF MISSISSIPPI, by and through
Governor Phil Bryant*

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2016, I electronically filed the foregoing document through the Court's ECF system, which automatically serves notification of the filing on counsel for all parties. In addition, I also will personally serve a copy of this document on the United States Attorney for the Northern District of Texas, and send a copy by certified U.S. Mail to the Attorney General of the United States and to the Honorable Sylvia Burwell, Secretary of the United States Department of Health and Human Services.

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS